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# Civil Docket
## United States District Court

**Jury demand date: EP 70 CA 134**

D. C. FORM NO. 106 REV. **Ernest Guinn**

TITLE OF CASE

Felipe Juarez Hurtado,
Ramon Avila Hurtado,
Victor Gaucin Lazalde,
Enrique Gaucin Lazalde,
and Jorge (Sergio) Miranda Gaucin
individually and as members of a class.

VS.

The United States of America

ATTORNEYS

**For plaintiff:**
Albert Armendariz
of Armendariz and Armendariz
609 Myrtle
El Paso, Texas 79901

**For defendant:**
Ralph E. Harris
*Assist. U. S. Atty.*
P. O. Box 74
El Paso, Texas 79941

| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|---|---|---|---|---|---|
| J.S. 5 mailed | Clerk | 7-14-70 | 62948 | $15.00 | |
| J.S. 6 mailed | Marshal | 7-15-70 | Transfer U.S. Treas. Lit. | | $15.00 |
| Basis of Action: Class Action Complaint for | Docket fee | 4-26-71 | 69935 | $5.00 | |
| | | 4-30-71 | | | $5.00 |
| Witnesses' Fees | Witness fees | | | | |
| Action arose at: | Depositions | | | | |

| DATE | PROCEEDINGS | DATE ORDER JUDGMENT NO. |
|---|---|---|
| 7-2-70 | (1) Filed Complaint for Witnesses' Fees, in dup. | $15.00 |
| 7-7-70 | Issued summons and copies. | |
| 7-21-70 | (2) Filed Ret. Summons, Ex. 7-16-70 at El Paso, Tex. | 3.00 |
| 7-27-70 | (3) Filed Pltfs' Interrogatories to Asist. U. S. Atty, in dup. | |
| 9-15-70 | (4) Filed Motion to Extend Time for Filing Answer of Deft., in dup. | |
| 9-15-70 | (5) Filed Order Granting Extension of Time for filing Deft's. answer, in dup. (Copies furnished counsel 9-21-) | |
| 9-25-70 | (6) Filed Answer of the U. S. A. to Complaint for Witnesses' Fees, in dup. | |
| 9-25-70 | (7) Filed Brief in Support of Government's Answer to Prohibit Maintenance of This Suit as A Class Action under Fed. Rule 23. | |
| 9-30-70 | (8) Filed Defendant's Objections to Interrogatories, in dup. | |
| 10-26-70 | (9) Filed Motion for Summary Judgment, in dup. (U.S.A.) | |
| 10-26-70 | (10) Filed Deft's. Brief in Support of Motion for Summary Judgment, in dup. | |
| 11-12-70 | (11) Filed Motion for a Period of Sixty Days Prior to Setting of Hearing on Motion for Summary Judgment, in dup. | |
| 12-3-70 | (12) Filed First Amended Complaint, in dup. | |
| 12-14-70 | (13) Filed Pltfs'. Cross Motion for Summary Judgment, in dup. | |
| 12-14-70 | (14) Filed Motion for Order under Rule 23(c) (1) and Order under 23(c) (2), in dup. | |
| 12-14-70 | (15) Filed Motion for an Order Calling A | |

| DATE | | PROCEEDINGS | DATE ORDER JUDGMENT NO. |
|---|---|---|---|
| | | Three-Judge Court, Title 28, Sec. 2282, 2284, in dup. | |
| 12-14-70 | (16) | Filed Motion for A Hearing on Written Interrogatories—Rule 33, F. R. C. P., in dup. | |
| 12-14-70 | (17) | Filed Plaintiffs' Brief, in dup. | |
| 12-15-70 | (18) | Filed Supplement Brief in Support of Gov's. Motion for Summary Judgment, in dup. | |
| 12-14-70 | | Hearing in open court on various Motions. Pltfs' Motion for Appointment of 3-Judge Court Denied. All other motions to be submitted on briefs and rulings to be made later. | |
| 4-8-71 | (19) | Filed Order Overruling Motion to Designate A Three-Judge District Court, in dup. (Copies furnished counsel 4-9-71) | |
| 4-8-71 | (20) | Filed Judgment granting Defts'. Motion for Summary Judgment, in dup. (Copies furnished counsel 4-9-71) | |
| 4-26-71 | (21) | Filed Pltfs'. Notice of Appeal, in trip. (Copy mailed to U.S. Court of Appeals, 5th Circuit, 4-27-71) | |
| 6-2-71 | (22) | Filed Transcript of Proceedings | |

[1]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

| | |
|---|---|
| FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN individually and as members of a class, v. THE UNITED STATES OF AMERICA | No. EP-70-CA-134 |

COMPLAINT FOR WITNESSES' FEES—Filed: July 2, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Plaintiffs, FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, individually and as members of a class as hereinafter alleged claiming against the United States of America and allege as follows:

I.

That this court has jurisdiction over the parties and the subject matter under Title 28, U.S.C., Section 1346 (a) (2), in that each Plaintiff and each member of the class hereinafter alleged is claiming a sum of money from the United States not in excess of the sum of ten thousand dollars ($10,000.00). That such claim is each case is based on an Act of Congress, to wit, Title 28 U.S.C. 1821.

II.

[2] That your Plaintiffs are aliens and residents of a foreign country the majority from Mexico members of a class of persons in that they are or have been incarcerated pursuant to rule 46 (b) of the Federal Rules of Criminal Procedure as material witnesses. That their numbers are

so numerous as to make it impracticable or impossible to join each of them as Plaintiffs herein and to bring each of them before this court. That the named representatives will fairly insure the adequate representation of all of the class. That the number of persons held as material witnesses in this district since Title 28, U.S.C. 1821 was amended is in the hundreds if not thousands. That the interest of each such person is consonant with the interest of the other and in nowise conflicting and that a class action is available to them under Rule 26 (b) (2) of the Federal Rules of Civil Procedure.

III.

Plaintiff FELIPE JUAREZ HURTADO and RAMON AVILA HURTADO allege that from the 25th day of March 1970 to the 19th day of June of the same year they were incarcerated in the El Paso County Jail as material witnesses in lieu of bond in a Criminal action filed in this District Court. Plaintiffs VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN are now and have been for the past two weeks incarcerated in the same jail for the same reason. That there are approximately fifty members [3] of this class so incarcerated in said jail at this time.

IV.

Plaintiffs allege that Title 28 U.S.C. 1821 applies to them and to each member of the class and reads, in pertinent part, as follows:

> "A witness attending in any Court of the United States, or before any person authorized to take his deposition pursuant to any rule of order of a Court of the United States, shall receive $20.00 for each day's attendance and for the time necessarilly occupied in going to and returning to his place of residence. . . . Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an

additional allowance of $16.00 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance. . .

. . . . .

[4] When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1.00 per day."

V.

Plaintiffs allege that as material witnesses they were attending to this court while incarcerated and subject to its orders and were and are entitled to be paid the sum of twenty dollars ($20.00) per day during such detention. That in addition to the said sum of twenty dollars for such court attendance, the Plaintiffs and each member of their class are entitled to additional subsistence payment as provided for in said statute plus the sum of one dollar ($1.00).

VI.

That the statute quoted in paragraph IV above has been interpreted by the United States Attorney in this district to require the payment of only one dollar per day to your Plaintiffs and members of the class. That pursuant to this policy in interpretation your Plaintiffs FELIPE JUARES HURTADO and RAMON AVILA HURTADO were paid the sum of one dollar per day of incarceration as were all and each member of the class paid upon their release. That the Plaintiffs VICTOR GAUCIN LAZALDE, JORGE (SERGIO) MIRANDA and all members [5] of the class still incarcerated will be paid the sum of one dollar per day upon release.

VII.

Plaintiffs allege that the least that each is entitled to under this statute is to his per diem payment of twenty dollars plus the sum of one dollar because of the fact that he is and has been detained. Plaintiffs would urge the court, however, that if the statute prevents the payment of sixteen dollars to your Plaintiffs or if it is so interpreted and applied, it is unconstitutional in that it allows payment of

subsistence to witnesses who are not incarcerated, but does not allow such payment to witnesses who are incarcerated the equal protection of the law.

VIII.

In the alternative, if the Statute, 28 U.S.C. Section 1821, in in and of itself is as interpreted and applied, provides for the payment of only one dollar ($1.00) to material witnesses who are incarcerated in lieu of bond, and no more, as the government contends, that statute, both on its face and as interpreted and applied, is contrary to the Constitution of the United States in that it deprives the Petitioner and all of the members of the class which they represent of their liberty and their livelihood without due process of law and without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

IX.

[6] The Statute is and of itself or as interpreted and applied in providing for the incarceration of material witnesses in lieu of a bond with the payment of only one dollar per day amounts to illegal and involuntary servitude, slavery based on ethnic discrimination as to each Plaintiff and member of the class in contravention of the Constitution of the United States and the Thirteenth Amendment, thereof.

X.

In the alternative, if the statute on its face or as interpreted and applied, provides for the payment of only one dollar ($1.00) per day to material witnesses who are incarcerated that statute is unconstitutional and void insofar as it deprives the Petitioners and all of the members of the class which they represent the equal protection of the laws, and therefore due process of law, in contravention of the Fifth Amendment of the Constitution of the United States, in that it provides for the payment of as much as thirty six ($36.00) dollars per day for witnesses who are waiting to be called to testify in the comfort of their hotel room while it provides for only one dollar per day to those

deprived of their freedam who are waiting for the same thing and for the same reason in the county jail.

XI.

The statute as interpreted is, therefore, void on its [7] face and as applied, and Petitioners and all of the members of the class which they represent are entitled to just compensation for the time they have spent and will spend in jail as material witnesses. Petitioners allege that the amount of Thirty Seven Dollars ($37.00) per day is just compensation which each and all of the members of the class should receive for each day of this incarceration.

XII.

That your Plaintiffs have agreed with the undersigned attorneys for themselves and on behalf of the class that the attorneys shall receive for representation of the Plaintiffs and the class, one third of each claim in the aggregate and that the court should order the payment direct to such attorneys of said attorney's fees.

WHEREFORE, premises considered, Plaintiffs pray for service upon the United States of America as provided for by Statute 28 U.S.C., Section 1821 of the Rules of Civil Procedure and as this complaint be accepted as a class action on behalf of the Plaintiffs and the class they represent and that your Plaintiffs and each member of the class be declared entitled to the sum of Thirty Seven Dollars ($37.00) per day during that incarceration and at least the sum of Twenty One Dollars ($21.00) per day during such incarceration. That the United States of America be required to give the names, addresses, [8] and periods of incarceration of all witnesses in this district so incarcerated and who would be members of the class so that the Court may determine the extent of the indebtedness to each member of the class and that the court order the United States of America to pay the attorneys herein, attorney's fees, equivalent to one third of each such claim in the aggregate and that the Court order such sum to be paid to your Plaintiffs, which class they represent and to their attorneys and for such

further relief in law and in equity that they may be justly entitled to.

ARMENDARIZ AND ARMENDARIZ
*Attorneys at Law*
/s/ Albert Armendariz Sr.

* * * * *

INTERROGATORIES—Filed: July 27, 1970

TO: Assistant United States Attorney
For The Western District of Texas
El Paso, Texas

Plaintiff's attach a list (names, United States Immigration and Naturalization Identification Number, and date of [9] commitment of each person) and request that the Defendant UNITED STATES OF AMERICA answer under oath the following questions as to each person named in said list in accordance with Rule 30 of the Federal Rules of Civil Procedure:

1. Is the date of commitment correct?
2. What is the date of release?
3. Did this person actually testify in Court? If so when and for how long?
4. What amount of money was this person paid for his detention?
5. What part of the sum inquired into in question #4 was at the rate of Twenty Dollars ($20.00) per day for actual giving of testimony in Court?
6. What is the home address of this person as given by him to the Immigration Authorities and shown of record?
7. Are witnesses subpoenaed in this jurisdiction to appear on behalf of the United States Government paid Twenty Dollars ($20.00) per day while waiting to testify in the case for which they are called regardless of whether they actually testify in Court or not?
8. Are subpoenaed witnesses who travel a required distance paid Sixteen Dollars ($16.00) per day [10] subsistance whether they actually testify in Court or not?

9. Are there any persons not included in the above list who are or have been committed as material witnesses in lieu of bond under Rule 46 (b) of the Federal Rules of Civil Procedure? If so, give the name, identification number, and date of commitment.
10. Answer interrogatories 1-6 above as to each person added to the list in answer to question 9.

Please take notice that a copy of such answers must be served upon the undersigned within 30 days after the service of these interrogatories.

ARMENDARIZ & ARMENDARIZ
*Attorneys at Law*
609 Myrtle
El Paso, Texas 79901

## MATERIAL WITNESSES,

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Hipolito Delgado-Bailon | A18 408 178 | 7-1-70 |
| Rafael Delgado-Bailon | A19 030 671 | 7-1-70 |
| Raul Valadez-Vega | A19 030 950 | 6-17-70 |
| Daniel Quirarte-Correa | A19 030 959 | 6-17-70 |
| Aniceto Carranza-Ruiz | A19 030 951 | 6-17-70 |
| Roberto Castaneda-Morales | A19 030 953 | 6-17-70 |
| Antonio Ramirez-Martinez | A19 030 737 | 6-17-70 |
| Ladislao Carmona-Avila | A19 030 738 | 6-17-70 |
| Eutemio Gaytan-Baeza | A19 030 739 | 6-17-70 |
| Enrique Torres-Silva | A19 030 736 | 6-17-70 |
| Lamberto Barraza-Saenz | A19 030 707 | 6-17-70 |
| Gerardo Lucero-Valenzuela | A14 578 416 | 6-17-70 |
| Antonio Najera-Cobos | A19 030 703 | 6-17-70 |
| Eluterio Nevarez-Quiroga | A19 030 088 | 6-5-70 |
| Angel Barraza-Calvo | A19 030 098 | 6-5-70 |
| Jose Fernandez-Delgado | A19 030 084 | 6-5-70 |
| Raymundo Solis-Calvo | A19 030 096 | 6-5-70 |
| Antonio Carrasco-Calvo | A19 030 094 | 6-5-70 |
| Albino Calvo-Salazar | A19 039 092 | 6-5-70 |
| Juan Francisco Herrera-Terrazas | A19 030 058 | 6-5-70 |
| Jose Valenzuela-Sota | A19 030 352 | 6-11-70 |
| Israel Martinez-Salgado | A19 030 351 | 6-11-70 |
| Juan Manuel Alatorre-Perez | A19 030 350 | 6-11-70 |
| Jorge Miranda-Gaucin | A19 030 359 | 6-11-70 |
| Enrique Gaucin-Lazalde | A19 030 358 | 6-11-70 |
| Victor Gaucin-Lasalde | A19 030 360 | 6-11-70 |
| Florentino Aguirre-Alamo | A19 030 359 | 6-11-70 |
| Miguel Angel Olguez-Garcia | A19 030 063 | 6-11-70 |
| Jesus Diaz-Quiroga | A19 030 015 | 6-11-70 |
| Angel Nava-Avalos | A19 030 014 | 6-11-70 |
| Onesimo Nevarez-Gutierrez | A19 030 380 | 6-11-70 |
| Carmelo Rivas-Carrasco | A19 030 379 | 6-11-70 |
| Adalberto Portillo-Pineda | A19 030 377 | 6-11-70 |
| Rene Maynez-Hernandez | A19 030 381 | 6-11-70 |
| Carlos Perez-Marquez | A19 030 374 | 6-11-70 |
| Roberto Aragon-Galarza | A19 030 245 | 6-4-70 |
| Juan Morales-Garcia | A19 030 247 | 6-4-70 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Rafael Saldana-Escobar | A19 030 246 | 6-4-70 |
| Jesus Garcia-Lopez | A19 030 260 | 6-4-70 |
| Francisco Ruiz-Zamudia | A19 030 257 | 6-4-70 |
| Emilio Andrade-Valdez | A19 030 258 | 6-4-70 |
| Jose Magana-Sanchez | A19 030 216 | 5-27-70 |
| Efren Brisuela-Magana | A19 030 214 | 5-27-70 |
| Antonio Hernandez-Lopez | A19 030 213 | 5-27-70 |
| Elias Herrera-Munoz | A19 030 220 | 5-27-70 |
| Elias Perales-Cardoza | A19 030 221 | 5-27-70 |
| Apolinar Mora-Garcia | A19 030 159 | 5-27-70 |
| Jaime Chavez-Madera | A19 030 157 | 5-27-70 |
| Jorge Rosales-Moran | A19 028 091 | 5-27-70 |
| Tito Mireles-Nanes | A19 030 036 | 5-27-70 |
| [12] | | |
| Ramon Sandoval-Javalera | A19 030 032 | 5-27-70 |
| Raquel Villalobos-Alderete | A19 030 034 | 5-27-70 |
| Manuel Ruiz-Rios | A19 029 069 | 5-27-70 |
| Heriberto Berumen-Galindo | A19 029 071 | 5-27-70 |
| Emilio Posado-Contreras | A19 029 067 | 5-27-70 |
| Juan Manuel Gonzalez-Avalos | A19 028 274 | 5-27-70 |
| Manuel Urbina-Terrazas | A19 030 178 | 5-27-70 |
| Guadalupe Pineda-Diaz | A19 030 173 | 5-27-70 |
| Gabriel Lucero-Diaz | A19 030 175 | 5-27-70 |
| Felix Leyva-Luna | A19 030 174 | 5-27-70 |
| Guadalupe Vargas-Sales | A19 030 179 | 5-27-70 |
| Amelia Armendariz-Villalobos | A19 030 399 | 5-27-70 |
| Arturo Fuentes-Caro | A19 029 004 | 5-18-70 |
| Salvador Romero-Romero | A19 029 002 | 5-18-70 |
| Jose Felix-Belmontes | A19 029 554 | 5-7-70 |
| Ruben Ruiz-Palma | A19 029 557 | 5-7-70 |
| Serafin Garcia-Munoz | A19 029 556 | 5-7-70 |
| Jose Teno-Baldioso | A19 029 555 | 5-7-70 |
| Edmundo Soto-Medina | A19 029 091 | 5-7-70 |
| Oscar Soto-Medina | A19 029 093 | 5-7-70 |
| Jorge Munoz-Grado | A19 029 551 | 5-7-70 |
| Fidel Banuelos-Lara | A19 029 552 | 5-7-70 |
| Edmundo Munez-Bustamante | A19 029 553 | 5-7-70 |
| Jose Herrera-Martinez | A19 029 579 | 4-17-70 |
| Alberto Valenzuela-Martinez | A19 029 423 | 4-14-70 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Manuel Lopez-Alvarez | A19 029 424 | 4-14-70 |
| Edgar Mario Soto-Mata | A19 027 894 | 2-2-70 |
| Francisco Zea-Galvan | A19 027 895 | 2-2-70 |
| Ricardo Hinostroza-Parra | A19 027 896 | 2-2-70 |
| Maria de Jesus Alvarez de Campos | A19 026 042 | 12-2-69 |
| Panfilo Carrillo-Rios | A19 025 402 | 10-27-69 |
| Rafael Herrera-Hernandez | A19 025 436 | 10-27-69 |
| Lorenzo Lopez-Gallardo | A19 025 401 | 10-27-69 |
| Ernesto Reyes-Barrios | A19 025 437 | 10-27-69 |
| Ramon Ruiz-Sanchez | A19 024 699 | 10-27-69 |
| Manuel Saucedo-Olivas | A19 025 438 | 10-27-69 |
| Luis Nunez-Hernandez | A14 252 462 | 10-13-69 |
| Manuel Vargas-Guerrero | A19 024 673 | 10-7-69 |
| Raul Majalca-Duarte | A19 024 672 | 10-7-69 |
| Gerardo Ayala-Ayala | A19 024 674 | 10-7-69 |
| Prudencio Quintana-Sanchez | A19 024 578 | 10-6-69 |
| Ramon Quintana-Sanchez | A19 024 529 | 10-6-69 |
| Santiago Torres-Quintana | A19 924 577 | 10-6-69 |
| Francisco Bueno-Tarango | A19 024 583 | 10-6-69 |
| Alejo Vargas-Ramirez | A19 024 613 | 10-6-69 |
| Jesus Aguirre-Ramirez | A19 024 616 | 10-6-69 |
| Jose Ramirez-Ochoa | A19 023 612 | 10-6-69 |
| Francisco Gonzalez-Porras | A19 023 091 | 10-1-69 |
| Natividad Cavada-Ultreras | A19 023 089 | 10-1-69 |
| Jose German Romero-Porras | A19 023 093 | 10-1-69 |
| Andres Serna-Nieves | A19 024 503 | 9-26-69 |
| Rosendo Serna-Villalpando | A19 024 502 | 9-26-69 |
| Cleofo Gomez-Flores | A19 024 193 | 9-26-69 |
| Atanacio Perez-Diaz | A19 024 250 | 9-23-69 |
| Cipriano Perez-Rivera | A19 024 251 | 9-23-69 |
| Arcadio Diaz-Ortiz | A19 022 736 | 9-23-69 |
| [13] | | |
| Jose Urbina Villanueva | A19 022 733 | 9-23-69 |
| Ramon Rocha-Burciaga | A19 022 735 | 9-23-69 |
| Celestino Quinones-Chavez | A19 022 734 | 9-23-69 |
| Manuel Soto-Bencomo | A19 024 130 | 9-23-69 |
| Juan Reyes-Villa | A19 024 134 | 9-23-69 |
| Miguel Rangel-Perez | A19 024 133 | 9-23-69 |
| Arturo Alvarado-Fernandez | A19 023 799 | 9-16-69 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Teofilo Alvarado-Fernandez | A19 023 798 | 9-16-69 |
| Angel Salazar-Medrano | A19 023 797 | 9-16-69 |
| Juan Montes-De La Cruz | A19 024 112 | 9-18-69 |
| Pedro Gallegos-Gallegos | A19 023 720 | 9-15-69 |
| Leopoldo Marin-Marin | A19 023 723 | 9-15-69 |
| Pablo Ortega-Sandoval | A19 023 754 | 9-12-69 |
| Mateo Sandoval-Rodriguez | A19 023 755 | 9-12-69 |
| Antonio Ortega-Perez | A19 023 755 | 9-12-69 |
| Federico Araujo-Lomeli | A19 023 921 | 9-2-69 |
| Feliciano Mendoza-Almendarez | A19 023 922 | 9-2-69 |
| Santos Rodriguez-Jacobo | A19 023 924 | 9-2-69 |
| Salome Rodriguez-Larez | A19 023 923 | 9-2-69 |
| Elizar Burciaga-Diaz | A19 023 383 | 8-28-69 |
| Maximino Gonzalez-Ortiz | A19 023 382 | 8-28-69 |
| Ambrosio Diaz-Villa | A19 023 384 | 8-28-69 |
| Heriberto Diaz-Villa | A19 023 380 | 8-28-69 |
| Jose Villa-Dominguez | A19 023 395 | 8-28-69 |
| Roberto Moreno-Escarcega | A19 023 394 | 8-28-69 |
| Manuel Salgado-Moncayo | A19 023 393 | 8-28-69 |
| Oscar Humberto Almanza-Sanchez | A19 023 392 | 8-28-69 |
| Demecio Gonzalez-Guerrero | A19 022 708 | 8-27-69 |
| Juan Ruiz-Ruacho | A19 022 707 | 8-27-69 |
| Jose Escobar-Barrazas | A19 022 706 | 8-27-69 |
| Daniel Monreal-Monreal | A19 021 024 | 8-25-69 |
| Alicia Gamboz-Nevarez | A19 023 373 | 8-25-69 |
| Pedro Ontiveros-Puente | A19 021 026 | 8-25-69 |
| Antonio Sanchez-Soto | A19 023 464 | 8-20-69 |
| Leopoldo Lechuga-Lechuga | A19 023 463 | 8-20-69 |
| Pablo Nevarez-Bustamante | A19 023 462 | 8-20-69 |
| Fabian Favela-Rivera | A19 023 461 | 8-20-69 |
| Pedro Franco-Molina | A19 021 187 | 8-19-69 |
| Amancio Rodriguez-Cisneros | A19 021 188 | 8-19-69 |
| Angel Villegas-Urives | A19 021 186 | 8-19-69 |
| Luis Hernandez-Orozco | A19 021 043 | 8-12-69 |
| Arcadio Cera-Marquez | A19 021 045 | 8-12-69 |
| Jose Morales-Martinez | A19 021 947 | 8-12-69 |
| Sergio Martinez-Cruz | A19 022 835 | 8-11-69 |
| Sabino Mares-Luna | A19 022 840 | 8-11-69 |
| Angel Gutierrez-Camuzano | A19 022 812 | 8-11-69 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Juan Garcia-Alcibor | A19 022 811 | 8-11-69 |
| Juan Majia-Magalde | A19 021 031 | 8-11-69 |
| Macario Campuzano-Villalobos | A19 543 490 | 8-11-69 |
| Guadalupe Ochoa-Dorado | A19 022 214 | 8-4-69 |
| Roque Marquez-Marquez | A19 022 217 | 8-4-69 |
| Reynaldo Frausto-Barboze | A19 022 215 | 8-4-69 |
| Benjamin Hernandez-Castaneda | A19 021 065 | 7-31-69 |
| Otilio Perez-Arellano | A19 021 061 | 7-31-69 |
| Porfirio Sifuentes-Molina | A19 021 063 | 7-31-69 |
| Doneciano Rosales-Guzman | A18 408 736 | 7-25-69 |
| Alejo Rosales-Avila | A18 408 735 | 7-25-69 |
| Fernando Diaz-Gomez | A18 408 733 | 7-25-69 |
| [14] | | |
| Apolinar Torres-Chairez | A19 022 180 | 7-24-69 |
| Magdaleno Gil-Salinas | AL9 022 182 | 7-24-69 |
| Ruben Arroyo-Paz | AL9 022 181 | 7-24-69 |
| Ramon Torres-Becerra | A19 022 184 | 7-24-69 |
| Juan Martinez-Torres | A19 022 185 | 7-24-69 |
| Gabriel Burciaga-Castro | AL9 022 183 | 7-24-69 |
| Leonardo Loya-Miramontes | A19 021 137 | 7-15-69 |
| Lesus Loya-Miramontes | A19 021 136 | 7-15-69 |
| Agustin Gonzalez-Hernandez | A19 022 072 | 7-15-69 |
| Manuel Moreno-Granillo | A17 888 200 | 7-9-69 |
| Rosendo Chavira-Salcido | A17 888 137 | 7-9-69 |
| Librado Zubia-Salcido | A17 888 135 | 7-9-69 |
| Benjamin Enriquez-Paez | A19 021 829 | 7-8-69 |
| Antonio Trujillo-Prieto | A19 021 828 | 7-8-69 |
| Nicolas Trujillo-Landeros | A19 021 827 | 7-8-69 |
| Monico Ramirez-Rubio | A19 021 116 | 7-2-69 |
| Jose Paniagua-Quintana | A19 021 119 | 7-2-69 |
| Eduardo Aguilera-Corral | A19 021 117 | 7-2-69 |
| Vicente Mejorada-Soto | A19 021 115 | 7-2-69 |
| Meliton Meraz-Quinones | A19 021 120 | 7-2-69 |
| Pablo Gomez-Gomez | A18 447 358 | 6-24-69 |
| Vicente Garay-Felix | A17 930 629 | 6-24-69 |
| Pilar Perez-Gomez | A18 447 357 | 6-24-69 |
| Felix Escarsega-Molinar | A19 021 511 | 6-24-69 |
| Carlos Teran-Rodriguez | A19 021 514 | 6-24-69 |
| Alfredo Parra-Falson | A19 021 513 | 6-24-69 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Gilberto Gonzalez-Gandara | A19 021 512 | 6-24-69 |
| Anastacio Sandoval-Valenzuela | A18 408 145 | 6-3-69 |
| Patrocinio Aguilar-Alvarez | A18 408 148 | 6-3-69 |
| Antonio Armendariz-Ceniceros | A17 889 591 | 5-29-69 |
| Melecio Garcia-Sanchez | A17 889 585 | 5-29-69 |
| Francisco Pinon-Porras | A17 889 595 | 5-29-69 |
| Magdaleno Portillo-Rodella | A17 889 587 | 5-29-69 |
| Simon Villanueva-Carreon | A17 889 593 | 5-29-69 |
| Cruz Isaac Creceres-Benitez | A17 889 589 | 5-29-69 |
| Manuel Robles-Robles | A18 408 024 | 5-29-69 |
| Manuel Venegas-Acevedo | A18 408 025 | 5-29-69 |
| Gonzalo ReyesMartinez | A18 408 026 | 5-29-69 |
| Juan Ramirez-Almansa | A19 016 942 | 5-23-69 |
| Rafael Vera-Mendoza | A17 890 362 | 5-23-69 |
| Manuel Martinez | A17 890 360 | 5-23-69 |
| Jesus Linares-Sierra | A17 890 361 | 5-23-69 |
| Ascencion Vega-Calzada | A17 890 351 | 5-19-69 |
| Maximo Tinajero-Vega | A17 890 358 | 5-19-69 |
| Ricardo Reyes-Ruiz | A17 890 357 | 5-19-69 |
| Manuel Parra-Martinez | A14 114 465 | 5-19-69 |
| Monserrat Gutierrez-Campos | A17 890 346 | 5-19-69 |
| Emeterio Dominguez-Baca | A17 890 345 | 5-19-69 |
| Carmen Saenz-Carta | A17 890 347 | 5-19-69 |
| Edmundo Beltran-Olvera | A17 889 574 | 5-7-69 |
| Reme Rodriguez-Rascon | A17 889 572 | 5-7-69 |
| Octavio Rodriguez-Ramos | A17 889 568 | 5-7-69 |
| Ernesto Castillo-Legarda | A17 889 566 | 5-7-69 |
| Vicente Ortega-Sandoval | A17 889 668 | 5-2-69 |
| Jesus Alcantara-Cervantes | A17 889 669 | 5-2-69 |
| Guadalupe Alcantara-Covarrubias | A17 889 671 | 5-2-69 |
| [15] | | |
| Jose Lara-Lopez | A17 889 648 | 4-30-69 |
| Jesus Garcia-Alvarez | A17 889 649 | 4-30-69 |
| Manuel Garcia-Alvarez | A17 889 650 | 4-30-69 |
| Monico Cabral-Alamillo | A17 889 607 | 4-25-69 |
| Antonio Gonzalez-Salazar | A17 140 898 | 4-25-69 |
| Ruben Alamillo-Solis | A17 889 606 | 4-25-69 |
| Humberto Martinez-Acosta | A17 889 187 | 4-14-69 |
| Ramon Castillo-Ramos | A17 889 113 | 4-14-69 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Jesus Torres-Torres | A17 889 138 | 4-14-69 |
| Rogelio Chavez-Sandoval | A17 889 091 | 4-11-69 |
| Elias Javalera-Medina | A17 889 090 | 4-11-69 |
| Dolores Chavez-Sanchez | A17 140 777 | 4-11-69 |
| Refugio Palma-Saens | A17 889 032 | 4-10-69 |
| Fermin Rodriguez-Gonzalez | A17 889 033 | 4-10-69 |
| Guillermo Medrano-Diaz | A17 889 034 | 4-10-69 |
| Jose Angel Mercado-Rodriguez | A14 545 772 | 4-8-69 |
| Belizario Rivera-Rodriguez | A17 886 395 | 4-8-69 |
| Agustin Mesta-Villa | A17 886 393 | 4-8-69 |
| Benjamin Ibarra-Rodriguez | A17 886 391 | 4-8-69 |
| Nicasio Miranda-Moreno | A17 888 108 | 4-8-69 |
| Jose Martinez-Martinez | A17 888 110 | 4-8-69 |
| Adolfo Armendariz-Prieto | A17 888 114 | 4-8-69 |
| Pedro Alcala-Cervantes | A17 888 584 | 4-2-69 |
| Jose Barajas-Villalobos | A17 888 582 | 4-2-69 |
| Jose Barajas-Sanchez | A17 888 583 | 4-2-69 |
| Jose de Jesus Lopez-Rosales | A17 888 176 | 4-1-69 |
| Manuel Martinez-Ruiz | A17 888 178 | 4-1-69 |
| Demetrio Martinez-Ruiz | A17 888 174 | 4-1-69 |
| Fidel Garcia-Herrera | A10 728 961 | 3-28-69 |
| Tomas Perez-De La Cruz | A17 888 899 | 3-28-69 |
| Carmen Villafuerte-Garcia | A17 888 900 | 3-28-69 |
| Rogelio Ramos-Vevarez | A17 888 894 | 3-28-69 |
| Eduardo Rodelas-Garcia | A17 888 895 | 3-28-69 |
| David Gomez-Munoz | A17 888 865 | 3-27-69 |
| Antonio Vasquez-Alvarado | A17 888 864 | 3-27-69 |
| Refugio Gomez-Munoz | A17 888 863 | 3-27-69 |
| Primitivo Bustamante-Medina | A17 888 898 | 3-27-69 |
| Luis Sauzameda-Lopez | A17 888 823 | 3-26-69 |
| Adolfo Sauzameda-Lopez | A17 888 824 | 3-26-69 |
| Isaias Flores-Sauzameda | A17 888 822 | 3-26-69 |
| Maria De La Cruz Olvera-Salazar | A17 888 870 | 3-26-69 |
| Fernando Perez-Rodriguez | A17 886 341 | 3-24-69 |
| Jesus Garcia-Garcia | A17 886 339 | 3-24-69 |
| Juan Rodriguez-Castillo | A17 888 552 | 3-24-69 |
| Gonzalo Hernandez-Martinez | A17 888 554 | 3-24-69 |
| Zenon Rodriguez-Castillo | A17 888 551 | 3-24-69 |
| Ubaldo Tarango-Garay | A14 122 880 | 3-21-69 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Roberto Ruiz-Hernandez | A17 888 040 | 3-21-69 |
| Alberto Marquez-Aldaz | A17 888 036 | 3-21-69 |
| Saul Prieto-Alvarez | A17 888 037 | 3-21-69 |
| Elizardo Priedo-Alvarez | A17 888 039 | 3-21-69 |
| Julian Gomez-Nieto | A17 886 160 | 3-21-69 |
| Refugio Herrera-Jordan | A14 538 954 | 3-21-69 |
| Fernando Hernandez-Gonzalez | A17 888 099 | 3-21-69 |
| Albino Hernandez-Gardea | A17 887 799 | 3-21-69 |
| Jesus Rodriguez-Chavez | A17 887 800 | 3-21-69 |
| [16] | | |
| Francisco Bustos-Duenos | A17 887 755 | 3-18-69 |
| Antonio Rodriguez-Lopez | A17 887 752 | 3-18-69 |
| Jesus Batres-Acosta | A17 887 169 | 2-26-69 |
| Eliseo Medina-Villanueva | A17 887 164 | 2-26-69 |
| Manuel Villanueva-Sanchez | A17 887 165 | 2-26-69 |
| Remedios Del Violar-Escajeda | A17 887 166 | 2-26-69 |
| Juan Romero-Gonzalez | A17 887 669 | 2-26-69 |
| Martin Alvarado-Alvarado | A17 887 667 | 2-26-69 |
| Jesus Rojo-Valenzuela | A17 887 299 | 2-24-69 |
| Luis Mendoza-Maldonado | A17 887 296 | 2-24-69 |
| Delfino Gutierrez-Avila | A17 887 167 | 2-17-69 |
| Simon Cuellar-Valenzuela | A17 887 168 | 2-17-69 |
| Amador Gutierrez-Peregrino | A17 886 336 | 2-11-69 |
| Felix Gutierrez-Morales | A17 886 338 | 2-11-69 |
| Jesus Mata-Gutierrez | A17 886 340 | 2-11-69 |
| Juan Fierro-Rodriguez | A17 886 342 | 2-11-69 |
| Jose Ontiveros-Salas | A17 887 146 | 2-11-69 |
| Juan Martinez-Perez | A17 887 145 | 2-11-69 |
| Aniceto Catarino-Reyes | A17 887 143 | 2-11-69 |
| Perfecto Tobanchi-Tobanchi | A17 887 144 | 2-11-69 |
| Victor Martinez-Rodriguez | A17 886 316 | 2-4-69 |
| Roberto Gomez-Hernandez | A17 886 310 | 2-4-69 |
| Valentino Hernandez-Ramirez | A17 886 308 | 2-4-69 |
| Gregorio Madera-Duarte | A17 886 312 | 2-4-69 |
| Jaime Zamora-Sosa | A17 886 314 | 2-4-69 |
| Luis Campos-Hernandez | A17 887 034 | 2-4-69 |
| El pidio Molina-Hernandez | A17 887 032 | 2-4-69 |
| Antonio Moreno-Andrade | A17 886 560 | 1-27-69 |
| Mateo Rodriguez-Ramos | A17 886 573 | 1-27-69 |

| Name | Imm. & Nat. I.D. No. | Date Committed |
|---|---|---|
| Cosme Mendoza-Aguirre | A17 886 561 | 1-27-69 |
| Javier Garcia-Baltazar | A17 886 573 | 1-27-69 |
| Bascual Alvarado-Garcia | A17 886 564 | 1-27-69 |
| Andres Cisneros-Garcia | A17 886 566 | 1-27-69 |
| Javier Cisneros-Garcia | A17 886 568 | 1-27-69 |
| Cruz Campos-Padilla | A17 886 414 | 1-23-69 |
| Ignacio Ravelo-Reyes | A14 541 852 | 1-22-69 |
| Juan Garcia-Garcia | A13 048 831 | 1-22-69 |
| Silvestre Gonzalez-Munoz | A17 886 518 | 1-22-69 |
| Fernando Luevano-Pinon | A17 886 517 | 1-22-69 |
| Sacramento De La Cruz-Campos | A17 886 438 | 1-16-69 |
| Gonzalo Olaguez-Ortiz | A17 886 442 | 1-16-69 |
| Roberto Velasquez-Lechuga | A17 886 434 | 1-16-69 |
| Apolonio Olaguez-Martinez | A17 886 432 | 1-16-69 |
| Manuel Urbina-Meraz | A17 884 383 | 12-30-68 |
| Jose Inez Rocha-Ojeda | A17 884 385 | 12-30-68 |
| Antelmo Astorga-Malero | A17 884 387 | 12-30-68 |
| Lamberto Astorga-Garcia | A17 884 379 | 12-30-68 |
| Artemio Melero-Gonzalez | A17 169 676 | 12-30-68 |
| Claudio Rivera-Rosales | A17 888 653 | 4-18-69 |
| Manuel Medina Diaz | A17 888 641 | 4-18-69 |
| Roberto Gonzalez-Gonzalez | A17 888 652 | 4-18-69 |
| Francisco Guzman-Rodriguez | A17 886 317 | 4-18-69 |

[17]

* * * * *

ANSWER OF THE UNITED STATES OF AMERICA TO COMPLAINT FOR WITNESSES' FEES —Filed: September 25, 1970

Now comes the United States of America, by and through its United States Attorney for the Western District of Texas, and in answer to plaintiffs' Complaint for Witnesses' Fees, would state as follows:

I.

United States of America admits the allegations contained in Paragraph I of plaintiffs' Complaint.

II.

Defendant admits that plaintiffs, Felipe Juarez Hurtado, Ramon Avila Hurtado, Victor Gaucin Lazalde, Enrique Gaucin Lazalde, and Jorge (Sergio) Miranda Gaucin are citizens of Mexico and that they have been held as material witnesses in pending criminal cases pursuant to Rule 46 (b), Federal Rules of Criminal Procedure.

As to other persons mentioned in Paragraph II of plaintiffs' Complaint, defendant has no knowledge and, therefore, neither admits nor denies the remaining allegations contained in Paragraph II. But the United States does specifically deny that this suit is the proper subject for a class action. [18] The mere allegation of multiple parties will not in and of itself justify a class suit. But rather the propriety of a class action depends upon the circumstances surrounding the case and there must be a positive showing of such circumstances.

III.

Defendant admits that Felipe Juarez Hurtado and Ramon Avila Hurtado were held as material witnesses upon their failure to post bond in the case of *United States of America* v. *Santos S. Casares and Tomas Lopez,* P-70-CR-55. This case was a criminal prosecution of Casares and Lopez for their illegal transportation of Felipe Juarez Hurtado and Ramon Avila Hurtado who were aliens ille-

gally in the country at the time and who had entered the country illegally.

Defendant also admits that Victor Gaucin Lazalde, Jorge (Sergio) Miranda Gaucin and Enrique Gaucin Lazalde were held as material witnesses upon their failure to post bond in the case of *United States of America* v. *Abe Herrera*, EP-70-CR-537. This case was a criminal prosecution of Abe Herrera for aiding and abetting the illegal entry of the above named witnesses who were aliens.

IV.

Defendant admits that 28 U.S.C. § 1821 is determinative of the compensation to be received by plaintiffs in this cause.

V.

[19] Defendant denies the allegations contained in Paragraph V of plaintiffs' Complaint.

VI.

Defendant admits that the United States Attorney has paid the named plaintiffs pursuant to the provisions of 28 U.S.C. § 1821 and will continue to do so.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiffs' Complaint.

VIII.

Defendant denies the allegations contained in Paragraph VIII of plaintiffs' Complaint.

IX.

Defendant denies the allegations contained in Paragraph IX of plaintiffs' Complaint.

X.

Defendant denies the allegations contained in Paragraph X of plaintiffs' Complaint.

XI.

Defendant admits that the named plaintiffs are entitled to just compensation provided by 28 U.S.C. § 1821 and have received or will receive just compensation as provided by said statute.

[20] Defendant denies all other allegations contained in Paragraph XI of plaintiffs' Complaint.

XII.

Defendant does not have sufficient information either to admit or deny the allegations contained in Paragraph XII. Defendant alleges, however, that 28 U.S.C. § 2678 provides that:

> "Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both."

Defendant would show the Court that under the provisions of 28 U.S.C. § 2678 the maximum attorney's fees which may be awarded an attorney in any judgment rendered pursuant to 28 U.S.C. § 1346(b) is 25 per cent, and the matter of attorneys fees for plaintiffs is controlled by the provisions of 28 U.S.C. § 2678.

XIII.

Defendant alleges that its United States Attorney has interpreted 28 U.S.C. § 1821 to mean that when a witness is in attendance in court or before a United States Commissioner or before any person authorized to take his deposition pursuant [21] to any rule or order of a court of the United States, he will receive $20 each day of attendance and for the time necessarily occupied in going to and returning from the court, plus ten cents per mile for going from and returning to his place of residence. In addition, those witnesses who are in attendance at points so far removed from their respective residences as to prohibit return thereto from day to day receive an additional allowance of $16 per day as expenses of subsistance while necessarily in attendance in court.

Witnesses who are salaried employees of the United States Government or who are in custody do not receive the allowance of $16 per day for expenses of subsistance.

When a witness is committed to custody for want of security for his appearance, he receives, in addition to his subsistance provided at the expense of the United States Government while he is in custody, compensation of $1.00 per day.

Whenever a witness who is detained in custody is in attendance in court or before a United States Commissioner or before a person authorized to take his deposition, he receives the witness fee of $20 for each day's attendance.

XIV.

The interpretation given the statute by the United States Attorney is in accordance with the clear wording and clear meaning of the statute and is the same as the interpretation given the statute by the various United States [22] Courts, both District Courts and Appellate Courts.

XV.

Any witness remanded to custody because his testimony would be material in a criminal proceeding appears before a United States Commissioner who sets a bond and requires him to give bail for his appearance as a witness in the criminal proceeding. If the person fails to give the bail to secure his appearance, he is committed to the custody of the Marshal pending final disposition of the criminal proceeding in which his testimony is material provided by Rule 46(b) of the Federal Rules of Criminal Procedure. If it is practical to do so, the witness' testimony is taken by deposition, and the witness is released without being required to give bail for his appearance.

The named plaintiffs in this cause were committed to the custody of the United States Marshal pending final disposition of a criminal proceeding in which their testimony was material upon their failure to give bail to insure their appearance as witnesses. Each named plaintiff was held as a material witness in the criminal proceeding involving the person accused of either aiding and abetting their illegal entry into the United States or transporting the named

plaintiffs after plaintiffs had made illegal entry into the United States.

WHEREFORE, premises considered, defendant prays that [23] upon hearing hereof plaintiffs take nothing by their suit and defendant go hence without day and recover all costs.

SEAGAL V. WHEATLEY
*United States Attorney*

s/ RALPH E. HARRIS
*Assistant U.S. Attorney*
P.O. Box 74
El Paso, Texas 79941

* * * * *

DEFENDANT'S OBJECTIONS TO INTERROGATORIES—Filed: September 30, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the United States of America, defendant in the above entitled and numbered cause and files this its Objections to Interrogatories and in support thereof would respectfully show unto the Court the following:

I.

Prior to defendant's having filed its answer in this cause, plaintiffs caused to be served upon defendant certain interrogatories. Defendant objects to each and every interrogatory in the following particulars:

[24] The interrogatories inquire about a large number of people who, according to plaintiffs, are citizens of Mexico and were arrested in the United States because of illegal entry.

The matters inquired about by plaintiffs are matters of public record and can be obtained by plaintiffs from the public records.

II.

It would be oppressive and place an unjust burden upon defendant to require defendant to furnish such information as a Mexican citizen's address, particularly in this

instance, where plaintiffs are contending that they are representing each and every individual inquired about in the interrogatories.

III.

It would be an unjust burden on defendant to require defendant to gather the information inquired about in the interrogatories when such information is just as readily available to plaintiffs as defendant.

IV.

The interrogatories are not directed to discovery of matters which are in issue in this cause.

[25] WHEREFORE, premises considered, defendant prays that defendant's Objections to Interrogatories be in all things sustained.

Respectfully submitted,

SEAGAL V. WHEATLEY
*United States Attorney*

s/ RALPH E. HARRIS
*Assistant U.S. Attorney*
P.O. Box 74
El Paso, Texas 79941

* * * * *

MOTION FOR SUMMARY JUDGMENT—Filed: October 26, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the United States of America, defendant in the above entitled and numbered cause, and files this its Motion for Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

This Motion for Summary Judgment is made under the provisions of Rule 56(b), Federal Rules of Civil Procedure. The pleadings in this cause fail to raise a material and genuine issue of fact. The only issue before the Court is the interpretation to be given to 28 U.S.C. § 1821.

The interpretations given 28 U. S. C. § 1821 by [26] numerous Circuit Courts of Appeal in the United States establish that defendant is entitled to judgment as a matter of law.

WHEREFORE, premises considered, defendant prays that its Motion for Summary Judgment be set down for hearing by the Court and that upon hearing, defendant's Motion and Summary Judgment be in all things granted and all costs in this cause be taxed against plaintiff and for such other and further relief, special or general, at law or in equity, to which defendant may show itself justly entitled to receive.

SEAGAL V. WHEATLEY
*United States Attorney*

s/ RALPH E. HARRIS
*Assistant U.S. Attorney*
P.O. Box 74
El Paso, Texas 79941

* * * * *

MOTION FOR A PERIOD OF SIXTY DAYS PRIOR TO SETTING OF HEARING ON MOTION FOR SUMMARY JUDGMENT—Filed: November 12, 1970

Now comes the Plaintiffs through their attorney of record and request the Court that a period of sixty (60) days to wit, up to and including the thirtieth (30th) day of December 1970, to answer the governments brief prior to setting of hearing on motion for summary judgment and as grounds therefor state the following:

I.

[27] That the Government has filed a motion for summary judgment and its brief in support of such motion.

II.

That no hearing has been set in Court for such motion for summary judgment.

III.

That the issues involved are numerous and complex and involve very valuable rights to both parties.

IV.

That a period of at least sixty (60) days is reasonably required by the Plaintiffs to act under rule 56 of the Federal Rules of Civil Procedure to file, answering brief, and any pleadings or affidavit deemed necessary.

V.

That the granting of the request of Plaintiffs herein having a delay in the setting of the hearing on motion for summary judgment cannot and will not affect or hurt the governments position and that the delay is sought so that justice may be done in this case.

WHEREFORE, premises considered, Plaintiffs pray that the setting for hearing on summary judgment be made after the thirtieth (30th) day of December, 1970.

ARMENDARIZ & ARMENDARIZ
*Attorneys For Plaintiffs*

s/ ALBERT ARMENDARIZ, SR.

[28]

FIRST AMENDED COMPLAINT—Filed: December 3, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

With leave of Court first had and received, comes the Plaintiffs, FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, individually and as members of a class as hereinafter alleged claiming against the United States of America and allege as follows:

I.

That each Plaintiff is a member of a class as hereinafter alleged and entitled to be paid by and are claiming a sum of money from the United States of America. That this Court has jurisdiction and authority over these claims in that they arise under Title 28 U.S.C. Sec. 1346 (a), (2). That the claim of each Plaintiff herein whether named or as a member of the class does not exceed the sum of TEN THOUSAND DOLLARS ($10,000.00). That each claim herein is based on an Act of Congress, to wit, Title 28, U.S.C. 1821. That this statute authorized recovery on the pecuniary allegations of this lawsuit.

II.

That this suit seeks to enjoin the enforcement of a Federal Statute, to wit, Title 28, U.S.C. 1821 as repugnant to the Constitution of the United States of America, Fifth and Thirteenth Amendments as more fully alleged hereinafter. That [29] it therefore is authorized as and arises out of Title 28 U.S.C. 2282 as directed by Title 28 U.S.C. 2284 and requires a three judge court.

III.

That there is a case of actual controversy between the parties herein regarding the interpretation and application of Title 28 U.S.C. 1821 and the Constitutionality thereof that authorizes the remedy of Declaratory judgment which the Plaintiffs seek herein as more fully alleged hereinafter.

That the authority for this relief is found in Title 28 U.S.C. 2201.

IV.

That this suit therefore is a suit for money judgment, declaratory judgment and for injunctive relief all brought in favor of the named Plaintiffs and a class under Rule 23 of the Federal Rules of Civil Procedure. That as grounds for and the Basis for a class action under Rule 23, Plaintiffs allege the facts to be as follows:

a) That your Plaintiffs are citizens of the Republic of Mexico who have been held, are being held or will be held in the future, if no injunction issues, as material witnesses pursuant to Rule 46 (b) of the Federal Rules of Criminal Procedure for and on behalf of the United States of America. That there are so many of these persons who have been held, are being held and will be held in the future that the joinder of all its members is impracticable. That the Defendant possesses [30] in his files the name and address of each individual previously held or held to date and that the class is amenable to all notices that may be required to satisfy due process or the discretion of this court, as provided by Rule 23 (c) of the Federal Rules of Civil Procedure. A partial list of members of the class is attached to this complaint as exhibit A.

b) That all questions of law and fact herein are common to the class with the exception of the exact dates of incarceration. In this connection, Plaintiffs state that they have been paid and will be paid the sum of one dollar ($1.00) per day for each day of incarceration under said rule.

c) That the claims of the representative parties are typical of the claims of the class in that they arise from such incarceration and all are complaining of the payment of the sum of one dollar ($1.00) for each day of such incarceration by the United States of America rather than the sum of $21.00.

d) That the representative parties will fairly and adequately represent all of the members of said class together with their interests.

e) That the prosecution of separate actions by individual members of the class would create the risk of:

(A) INCONSISTENT OR VARYING ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS [31] WHICH WOULD ESTABLISH INCOMPATIBLE STANDARDS OF CONDUCT FOR THE DEFENDANT UNITED STATES OF AMERICA IN OPPOSITION TO THE CLASS, AND/OR.

(B) ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS WHICH WOULD AS A PRACTICAL MATTER, BE DISPOSITIVE OF THE INTERESTS OF THE OTHER MEMBERS AND PARTIES TO THE ADJUDICATION.

f) That the United States of America, through its agents has acted on grounds generally applicable to the class, to wit, that such incarceration as material witnesses for the Government merits the payment of but one dollar ($1.00) per day of such incarceration, thereby making appropriate injunctive relief and corresponding Declaratory relief with respect to the class as a whole.

V.

Plaintiffs allege that they are entitled to an order of this Court that this suit may and will be maintained as a class action.

VI.

Plaintiffs allege that they are entitled to a three judge Federal Court to adjudicate this matter and that only a three judge Court has jurisdiction over this issue.
[32]

VII.

Plaintiffs allege that an actual controversy presenting a justiciable issue exists between the parties herein regarding the interpretation and constitutionality of Title 28 U.S.C. 1821 in that the Government has in the past, and admits in its pleadings that it will in the future, interpreted said statute to mean that Plaintiffs and members of their class are and will be entitled to payment of one dollar ($1.00) for each day of such incarceration while Plaintiffs

claim and allege that such statute requires and authorizes the payment of the sum of twenty dollars ($20.00) per day or the aggregate sum of twenty-one dollars ($21.00) per day of such incarceration. Plaintiffs further allege, in the alternative, that if said statute authorizes the sole payment of one dollar ($1.00) per day, as compensation for such incarceration, it is repugnant to the Constitution of the United States, Amendment Five, in that it authorizes the deprivation of life and liberty without due process of law and authorizes the deprivation of life and liberty without due process of law and authorizes the taking of property in the nature of services for public use without just compensation, and is further repugnant to the 13th amendment, thereof in that it authorizes involuntary servitude not the subject of a crime for which each Plaintiff has been convicted and is further repugnant to the policy and theory of the law of the land.

[33]

VIII.

Plaintiffs allege that they are entitled to a declaratory judgment and a corresponding permanent injunction against the United States and its agents declaring that the Plaintiffs and each of them is entitled to the sum of twenty-one dollars ($21.00) per day of incarceration under the provisions of rule 46 (b) of the Federal Rules of Criminal Procedure and Title 28 U.S.C. §1821, and prohibiting and enjoining the United States and its agents from incarcerating members of the class in the future and paying them and each of them, upon such incarceration to pay such persons the sum of twenty-one dollars ($21.00) per day.

IX.

Plaintiffs allege that they are entitled to a judgment as against the United States of America in a sum equal to twenty-one dollars ($21.00) per day of their past incarceration minus the sum of one dollar ($1.00) per day that they have been previously paid, together with interest from date of entitlement.

X.

In the alternative, if the statute on its face or as interpreted and applied, provides for the payment of only one

dollar ($1.00) per day to material witnesses who are incarcerated, that statute is unconstitutional and void insofar as it deprives the Petitioners and all of the members of the class which they represent, the equal protection of [34] the laws, and therefore due process of law, in contravention of the Fifth Amendment of the Constitution of the United States, in that it provides for the payment of as much as thirty-six ($36.00) dollars per day for witnesses who are waiting to be called to testify in the comfort of their hotel room while it provides for only one dollar ($1.00) per day to those deprived of their freedom who are waiting for the same thing and for the same reason in the county jail. In this connection, Plaintiffs would show the court that the Government pays others called as witnesses the sum of twenty dollars ($20.00) per day for attending court even though they are not actually in Court and whether they are called to testify or not while it pays members of Plaintiffs' class the sole sum of one dollar ($1.00) per day even during the time that the court in which they are to testify in is actually in session and has called the specific case in which each is to testify. Plaintiffs further allege that on many occassions when they give statements and testify for the Government in other Administrative proceedings they are not paid the twenty dollars ($20.00) per day. Plaintiffs allege that they are entitled to a Declaratory Judgment declaring Title 28 U.S.C. 1821 violative of the Constitution Amendment 5 and 14 and for a corresponding injunction enjoining the Government from paying others the sum for waiting to give their testimony without paying members of the class the same amount.

[35]

XI.

Plaintiffs further allege in the alternative, that if the three judge Federal Court should find that such statute reads the sum on one dollar ($1.00) per day for such incarceration and that such statute is unconstitutional for that reason or for any reason that the Plaintiffs and each member of the class is entitled to trial by jury to determine the true and fair value of the time spent in jail awaiting to testify as in case of eminent domain.

Plaintiffs pray for relief as follows:

*1.* For an order under rule 23 of the Federal Rules of Civil Procedure as a class action.

*2.* For such orders as the court may deem fit at his discretion to notify the members of the class as contemplated by said Rule 23.

In this connection, Plaintiffs respectfully suggest to the court that a full list of the names, addresses, dates of incarceration and payments to each member of this class is readily available in separate and distinct records in the hands of several agencies of the Defendant, such as the office of the United States Marshall, the United States Attorney's office and the Immigration and Naturalization Service and that such records should be made available to the court voluntarily or on the court's order to fascilitate the notification of these persons under Rule 23 and for payment and distribution of any [36] judgment recovered on their behalf.

*3.* That a three-judge court be convened to try this case on its merits.

*4.* That after hearing on the merits, the court issue the following judgment:

A. (1) Declaring that Title 28 U.S.C. 1821 requires the payment of the sum of twenty dollars ($20.00) to each member of the class and Plaintiffs herein, for each day of incarceration under Rule 47(c) of the Federal Rules of Criminal Procedure in addition to the daily sum of one dollar ($1.00) and their subsistance.

(2) Enjoining the Defendant from any further incarceration of any person under such rule under the present interpretation of 1821 at one dollar ($1.00) per day total payment.

(3) Requiring the Defendant, through his agents to pay to Plaintiffs and the members of the class such sum of money as will equal twenty-one dollars ($21.00) per day of each individual incarceration minus any sum previously paid to such person, together with interest from date of entitlement.

(4) Ordering the Defendant to pay, directly to Plaintiffs' attorneys, such part of each individual [37] recovery, as the court may deem just and within legal bounds.

B. If after final hearing, the court feels that Title 28

U.S.C. 1821 limits payment to Plaintiffs and members of their class to one dollar ($1.00) per day and in that event only for a judgment.

(1) Declaring Title 28 U.S.C. 1821 unconstitutional as repugnant to the 5th and 13th amendment thereof.

(2) Enjoining the Defendant from further incarceration of persons and members of the class under Rule 47(c) until such time as Congress passes a constitutional statute.

(3) Declaring Plaintiffs and the classes' right to a trial by jury for post incarceration on the issue of the reasonable value of such incarceration and service.

(4) Ordering Defendants to pay directly to Plaintiffs' attorneys such part of each individual entitlement as found by the jury as the court may deem just and within legal bounds.

C. Ordering the Defendant to cease and desist from the unequal payment of witness fees to those incarcerated during actual trial of the cause in which each of such incarcerated witness is to testify.

[38] D. For court costs.

E. For such further relief in law and in equity to which Plaintiffs and the class may be justly entitled to.

ARMENDARIZ & ARMENDARIZ
*Attorneys at Law*
609 Myrtle Ave.
El Paso, Texas
By s/ Albert Armendariz, Sr.

NOTE: Exhibit A attached to First Amended Complaint omitted; heretofor copied on page 11.

* * * * *

PLAINTIFFS' CROSS MOTION
FOR SUMMARY JUDGMENT—Filed: December 14, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Plaintiffs and each of them, for themselves and for the class they represent, and file this their Cross Judgment for summary judgment and in support thereof would respectfully show the Court the following:

I.

That this Cross-Motion for Summary Judgment is made in lieu of and without waiving the position of the plaintiffs that this case should be declared a class action and decided [39] by a three-judge Federal court.

II.

That in this event only the Plaintiffs make this Motion for Summary Judgment under the provisions of Rule 56(b), Federal Rules of Civil Procedure, in that the only issue before this Court is an issue of law involving the interpretation and application of a Federal statute to wit, 28 U.S.C. Sec. 1821. That interpretations given to said statute by the Court in Higginson's case, Federal case #6471 (1802) establishes that the Plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, premises considered, plaintiffs pray that its Motion for Summary Judgment be set down for hearing by the Court and that upon hearing, plaintiffs' Motion and Summary Judgment be in all things granted and all costs in this cause be taxed against defendant and for such other and further relief, special or general, at law or in equity, to which plaintiffs may show themselves justly entitled to receive.

s/ ALBERT ARMENDARIZ
*Attorney for Plaintiffs*

609 Myrtle Ave.
El Paso, Texas 79901

MOTION FOR ORDER UNDER RULE 23 (c) (1) AND ORDER UNDER 23 (c) (2)—Filed: December 14, 1970

TO SAID HONORABLE COURT:

[40] Now come the Plaintiffs and allege for the purposes of this Motion that in their First Amended Complaint they have alleged full compliance with all the pre-requisities of Rule 23 to merit a class action. That in addition thereto, Plaintiffs allege that a denial of a class action is unwarranted, impractical and will deprive the members of the class of a valuable right, because each and every member

of that class is a Mexican alien, unversed in United States law and procedures, who has been paid and will be paid the sum of $1.00 per day for his incarceration and summarily deported to Mexico where he is unable because of poverty and lack of knowledge of his rights to come to the United States and make claim for what is justly his.

That each member of the class is readily ascertainable in the records of the United States Government and several of its agencies that that notification to each member of the class is possible.

WHEREFORE, premises considered, Plaintiffs pray for a determination by order of this court that this action is to be maintained as a class action in accordance with Rule 23(c)(1) of the Federal Rules of Civil Procedure and a further order of this Court under said Rule 23(c)(2) directing to the members of the class the best notice practicable under the [41] circumstances.

Respectfully submitted,

s/ ALBERT ARMENDARIZ
*Attorney for Plaintiffs*
609 Myrtle
El Paso, Texas 79901

MOTION FOR AN ORDER CALLING A THREE-JUDGE COURT, TITLE 28, SEC. 2282, 2284—Filed: December 14, 1970

TO SAID HONORABLE COURT:

Now comes the Plaintiffs and present through this Motion to the Judge of this court, their first Amended Petition and pray for a three-judge court, and as grounds therefore would show the court the following:

I.

That this action comes under the purview of Title 28 U.S.C. 2282 and 2284(2) in that this is a suit seeking an injunction restraining the enforcement, operation and execution of an Act of Congress as repugnant to the Constitution of the United States.

II.

That this Court order notice to be given by registered or certified mail to the Attorney General of the United States by the Clerk of this Court unless waived.

[42] WHEREFORE, premises considered, Plaintiffs pray the Court that he notify the Chief Judge of this circuit requesting the said Chief Judge to designate a circuit judge and one other district judge to serve as members of this court to hear and determine this proceeding and that notice issued to the Attorney General, such notice being of at least five (5) k days duration and by registered or certified mail originating with the clerk of this Court and for such orders in the premises to which Plaintiffs may be justly entitled to.

Respectfully submitted,

s/ ALBERT ARMENDARIZ
*Attorney for Plaintiffs*
609 Myrtle
El Paso, Texas 79901

MOTION FOR A HEARING ON WRITTEN INTERROGATORIES—RULE 33, F.R.C.P.—Filed: December 14, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now come plaintiffs and move under Rule 33 of the Federal Rules of Civil Procedure for a hearing and as grounds therefore would show the Court the following:

I.

That your Plaintiffs served upon the Defendant a group of ten interrogatories. That the Defendants thereafter filed with this Court certain objections to said interrogatories but have failed to set the objections for a hearing as required [43] by this Rule and have wholly failed to make answers to said interrogatories.

II.

Plaintiffs allege that the objections of the Defendant to the interrogatories are without merit and that this Court

should require the Government to answer each of such interrogatories immediately. That such objections were directed at all of the interrogatories and not to each of them as required by law.

WHEREFORE, premises considered, Plaintiffs pray for a hearing on said objections and that upon such hearing, the Government be required to answer Plaintiffs' interrogatories.

Respectfully submitted,

s/ ALBERT ARMENDARIZ
*Attorney for Plaintiffs*
609 Myrtle Ave.
El Paso, Texas 79901

NOTE: Portion of Record Omitted
Filed in its Original Form.

* * * * *

ORDER OVERRULING MOTION TO DESIGNATE A THREE-JUDGE DISTRICT COURT—Filed: April 8, 1971

On the 14th day of December, 1970, came on to be considered by the Court, plaintiffs' motion to Designate a [44] Three-Judge Court to consider the above entitled and numbered cause, and the Court, after considering the pleadings and the applicable law, is of the opinion that the pleadings in this cause fail to raise a substantial constitutional question. The complaint fails to allege a basis for equitable relief and the complaint fails to raise an issue which would bring this case within the requirements of Title 28, United States Code, Section 2284.

It is, therefore, ORDERED, ADJUDGED and DECREED that plaintiffs' Motion to Designate a Three-Judge District Court to hear this cause is in all things overruled.

s/ ERNEST GUINN
*United States District Judge*

JUDGMENT—Filed: April 8, 1971

On the 14th day of December, 1970, came on to be heard by the Court, defendant's motion for summary judgment and the plaintiffs having appeared by and through their counsel and the defendant having appeared by and through the United States Attorney, and the Court, after considering the pleadings, arguments of counsel, and applicable law, is of the opinion that the pleadings in this cause fail to raise a material and genuine issue of fact, and the only issue before the Court is the interpretation of Title 28, United States Code, Section [45] 1821. The Court is of the opinion that the defendant is entitled to judgment in this cause.

It is, therefore, ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment is in all things granted, with costs taxed against plaintiffs.

s/ ERNEST GUINN
*United States District Judge*

NOTICE OF APPEAL—Filed: April 26, 1971

Notice is hereby given that FELIPE JUAREZ HURTADO, et. al., Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order Overruling Motion To Designate A Three-Judge District Court and from the final judgment entered in this action on April 8, 1971.

ARMENDARIZ AND ARMENDARIZ
*Attorneys for Plaintiffs*

s/ ALBERT ARMENDARIZ, SR.
609 Myrtle
El Paso, Texas 79901

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 71-2034

Summary Calendar *

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FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, Individually and as members of a class,

PLAINTIFFS-APPELLANTS,

versus

THE UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE.

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*Appeal from the United States District Court for the Western District of Texas*

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(December 21, 1971)

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Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: The five appellants are aliens who, as material witnesses in pending federal criminal prosecutions have been incarcerated pursuant to Rule 46(b), F.R.Crim.P.,[1] upon failure to give bail. Some of them were

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F. 2d 409, Part I.

[1] "Rule 46, *Bail*

. . . . .

"(b) *Bail for Witness.* If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

confined at the time suit was filed; others had been recently released. On behalf of themselves and a class of persons similarly situated they filed suit challenging the validity of payment to them, pursuant to 28 USC § 1821,[2] the statute prescribing compensation to witnesses in federal cases, of only $1 per day while they are incarcerated and not in attendance in court. They sought damages in the form of payment of additional amounts claimed to be due, and declaratory and injunctive relief relating to § 1821.

Appellants urge that, as to a witness incarcerated and not in attendance in court, § 1821 should be construed to require payment to him of $21 per day, and, alternatively that, if that section permits payment to him of only $1 per day, it violates the Due Process and Just Compensation Clauses of the Fifth Amendment to the constitution and creates an involuntary servitude in controvention of the Thirteenth Amendment.

The District Judge declined to request a three-judge court on the ground that no substantial federal question was presented, and granted summary judgment for the

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[2] "§ 1821. *Per diem and mileage generally; subsistence*

"A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

government on issues of statutory construction and constitutionality. We affirm.

Appellants have not challenged the constitutionality of Rule 46(b), or the standards for incarceration, or the validity of incarcerating a witness who is unable to give bail. Rather their challenge is to the scheme of payment provided for those who are confined.

1. Statutory Interpretation.

Section 1821 explicitly declares that $20 per day is due only when a witness is "in attendance" or travelling to and from court. Only when "[a] witness [is] attending in any court of the United States . . . shall [he] receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same. . . ." It does not seem a slip of the draftsman's pen that the section omits to extend the $20 per day allowance to each day of a detained witness' confinement. In other respects the statute specifically treats incarcerated witnesses apart from non-incarcerated witnesses, leading to the inference that the failure explicitly to grant the $20 to the former group during their detention was deliberate. For example, "[w]itness . . . who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 for expenses of subsistence. . . ." "When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

We, therefore, reject the theory that § 1821 requires payment of $21 per day to a detained witness not in attendance in court.

2. Constitutional Arguments.

a. *Thirteenth Amendment.*

There is no merit to the contention that detention without payment reasonably reflecting the loss of working time creates an involuntary servitude. In *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944) we rejected a similar argument made by a conscientious objector, who "lays much stress on the fact that he was to be paid little, if anything, for his work":

> Whether appellant was to be paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment.

142 F.2d at 799. In numerous ways the government legitimately impinges upon the liberty of the individual without the impingement alone constituting the kind of involuntary servitude contemplated by the Thirteenth Amendment, for example, requiring a conscientious objector to perform alternative service, *Klubnikin v. U.S.*, 227 F.2d 87 (9th Cir.), *cert. denied*, 350 U.S. 975, 100 L.Ed. 846. *reh. denied*, 351 U.S. 915, 100 L.Ed. 1449 (1955); *Heflin v. Sanford, supra;* requirements of tax laws, *Porth v. Brodrick*, 214 F.2d 925 (10th Cir., 1954); control and education of children, *Bryant v. Brown*, 18 So. 184 (Miss. Sup. Ct. 1928); refusal to work for municipality as condition for receiving aid for family, *Commonwealth v. Pouliot*, 292 Mass. 229, 198 NE 256 (1935); requirement that able-bodied men work on roads, *Butler v. Perry*, 240 U.S. 328, 60 L.Ed. 672 (1916); administration of veterans' decedents estates by public administrator without payment of fees, *Crews v. Lindquist*, 197 NE 768 (Ill. Sup. Ct. 1935); jury duty, *Id.* (dictum); commitment of a defendant acquitted on plea of insanity, *State v. Snell*, 89 P. 931 (Wash. Sup. Ct. 1907).

### b. *Fifth Amendment Due Process.*

It is helpful to an understanding of this issue to reiterate what we pointed out above, that appellants do not claim that material witnesses, even indigent ones, may not constitutionally be imprisoned if they cannot give bail, that rather they claim that the government may incarcerate material witnesses if, and only if, it provides compensation sufficient in amount to reach constitutional standards. The argument might be restated this way: in a balancing of interests the governmental interest in assuring the testimony of material witnesses justifies imposing loss of liberty only when the government properly compensates those imprisoned. The argument must be rejected.

A closely similar argument was made and rejected in *Commers v. U.S.*, 66 F. Supp. 943 (D. Mont.), *aff'd*, 159 F.2d 248 (9th Cir.), *cert. denied*, 331 U.S. 807, 91 L.Ed. 1828

(1946). A World War II draftee was disabled in combat and sued under the Just Compensation Clause of the Fifth Amendment for the capitalized value of his future income lost because of his injuries. The District Court found that his induction and assignment were constitutionally valid and pointed out that his theory, if accepted, would severely reduce the liberties of citizens—i.e., a conclusion that deprivation of personal liberty is acceptable in some circumstances by reason of the government's willingness to disburse dollars as compensation carries with it the implication that in other circumstances liberty (or other constitutionally guaranteed rights) may be taken so long as paid for in dollars.

Also the wording of the Fifth Amendment is not favorable to appellants' theory. It declares that "life, liberty, or property" shall not be deprived without due process. In the next clause it permits "private property" to be taken "for public use" only if "just compensation" is paid. The juxtaposition of the two clauses is significant. Only private property is compensable. The result is not a lower standard for deprivation of "life" or "liberty" but one more strict —"life" and "liberty" are not alienable if only money is the proffered consideration.

Appellants urge that at least to some extent Fifth Amendment due process incorporates Fourteenth Amendment equal protection standards, and that those standards have not been met. Only recently the Supreme Court has said:

> While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification which meets the test articulated in *Dandridge* [*Dandridge v. Williams*, 397 U.S. 471, 487, 25 L.Ed. 2d 503 (1970)] is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling v. Sharpe*, 347 U.S. 497, 499.

*Reed v. Reed*, — U.S. —, 40 L.W. 4013, 4016 (Nov. 22, 1971)' The *Dandridge* test is that the federal statute must be "rationally based and free from invidious discrimination."

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' See also: Steward Mach. Co. v. Davis, 301 U.S. 548, 81 L.Ed. 1279 (1937); Hurd v. Hodge, 334 U.S. 24, 92 L.Ed. 1187 (1947).

Under § 1821 each incarcerated and nonincarcerated witness when in attendance in court receives $20 "for each day's attendance." The nondetained witness receives a travel allowance for going from and returning to his place of residence. The detained witness receives none and is entitled to none, since necessarily the government must transport him. The jailed witness receives his subsistence in kind, while the witness not in jail, if he is sufficiently far from his residence that he cannot return thereto, is entitled to a subsistence allowance of $16 per day. Comparing the incarcerated witness in attendance with his counterpart, the nonincarcerated witness in attendance (and entitled to subsistence), the former is entitled to $21 per day and subsistence in kind, the latter to $36 per day, but he must pay for his own subsistence. We perceive no lack of rationality or discrimination in this.

The sole inequality remaining is that between payment made to a witness while attending court and the $1 per day paid to an incarcerated witness when not attending. Appellants' argument seems to be that the $20 per day attendance fee is intended to compensate a witness, incarcerated or not, for the loss of his ability to carry on his normal pursuits, and that an incarcerated witness suffers the same loss of ability to carry on normal pursuits whether attending court or languishing in jail waiting for court to commence, but is compensated only $1. The short answer is that governmental recognition of its interest in having persons appear in court by paying them for that participation in judicial proceedings, does not require that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary. That the government pays for one stage does not require that it pay in like manner for all stages. Also we doubt that the $1 is related at all to compensation, but rather is a stipend for items of personal comfort and care needed by one in confinement, such as toilet articles, sweets, and reading matter. In addition, appellants' position would deny the federal government the ability to pursue mischiefs with partial solutions. *See,* in the equal protection area, *e.g., Railway Express Agency v. New York,* 336 U.S. 106, 93 L.Ed. 533 (1949); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 99 L.Ed. 563 (1955).

c. *Fifth Amendment Just Compensation.*

The ability to earn a living, appellants say, is "private property" within the meaning of the Just Compensation Clause, so that it cannot be taken without payment of compensation. This suggestion was presented and rejected in *Commers v. U.S., supra.* We doubt the appropriateness of equating "property" in the Due Process Clause with "private property" in the Just Compensation Clause. To do so would present the Congress with setting the standard of payment for a class of private property, which is a judicial function. *See, e.g., Monongahelo Nav. Co. v. U.S.,* 148 U.S. 312, 37 L.Ed. 463 (1893). Also, as we have said earlier, the idea that incarceration is to be validated by dollar payments rather than on the basis of other governmental interests is a theory not easily confined within rational limits.

3. Three judges or one.

The foregoing leads us to the conclusion that the District Court correctly found that the federal questions were insubstantial, so that there was no necessity of requesting a three judge court. *Ex parte Poresky,* 290 U.S. 30, 78 L.Ed. 152 (1933). We reject the suggestion that the *Poresky* principle is inapplicable because money damages are here sought under 28 USC § 1346(a)(2), while in *Poresky* jurisdiction was founded on 28 USC § 1331. The purposes of avoiding unnecessary assemblage of three judges are equally applicable whatever jurisdictional head the plaintiff invokes.

4. Conclusion.

Thus we reach the ultimate result that the District Judge was correct in denying a three-judge court and in granting a summary judgment for the United States.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1971

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No. 71-2034
Summary Calendar

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D. C. Docket No. EP-70-CA-134

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, Individually and as members of a class,

PLAINTIFFS-APPELLANTS,

versus

THE UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE.

*Appeal from the United States District Court for the Western District of Texas*

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

DECEMBER 21, 1971

Issued As Mandate: March 9, 1972

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 871-2034

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, Individually and as members of a class,

PLAINTIFFS-APPELLANTS,

versus

THE UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE.

*Appeal from the United States District Court for the Western District of Texas*

[U.S. Court of Appeals Filed Mar. 1, 1972]

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for leave to file a petition for rehearing out of time in the above cause, is hereby GRANTED and the petition for rehearing is DENIED.

SUPREME COURT OF THE UNITED STATES

No. 71-6742

FELIPE JUAREZ HURTADO ET AL.,

PETITIONERS,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 10, 1972

☆ U.S. Government Printing Office: 1972—489-356/320